

AUG 13 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 332

PLAINTIFF'S BRIEF ON PETITION FOR CERTIORARI

J. W. KOHN, M. S. KOHN, AND J. W. KOHN, Admin-
istrator of the Estate of Carrie Kohn, deceased,
and CENTRAL DISTRIBUTING COMPANY,
INC., (A Defendant).

Petitioners

vs.

CIRCUIT COURT OF APPEALS for the SIXTH
CIRCUIT, with direction to the UNITED
STATES DISTRICT COURT for the Eastern
District of Kentucky, and J. W. MARTIN, et al.,

Respondents

Case of J. W. Kohn, et al., vs. Central Distributing Company, Inc.,
and J. W. Martin, et al, pending in the United States District
Court for the Eastern District of Kentucky.

The Defendant Central Co. join in this Petition for the Writ.
(Former Appeal No. 177)

The law for this Application is U. S. Code 237 (b) 28 U.S.C. 344-7

HARVEY H. SMITH,
Attorney for J. W. Kohn, et al

GEO. E. WHITMAN,
Attorney for Central Distributing Company, Inc.

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See cases at 43 page on conclusions of Law.

See cases at 43 page on Final Judgment.

See cases at 43 on the necessity of defense pleadings in Interlocutory injunctions—Must comply with state practice.

INDEX — AUTHORITIES — STATUTES SUMMARY.

POINTS

CERTIORARI

Section 347, USC Title 28-Sec. 347-a,

U. S. C. Title 28:877.

Lutcher and Moore Lumber Co., vs. Knight, 217 U. S. 257.

Loneragan vs U. S. 303, U. S. 33.

Panama Mail Co. vs Bargas 281 US 670.

U. S. vs Rimer 220 US 547.

Supreme Judicial Code Sections 240 etc.

It is the established doctrine of this Court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the application for the writ.

Williams vs The Bank of the United States 11 Wheat, 414

77 US 10, Wall, 416-418-Rule 74-75. Ky. Statutes.

Import License Tax, page 23 (Void). 1934, 1936, 1938.

1934 Alcohol Beverage Act of Kentucky, violation of Amendment 7-Const. Ky.

Federal Trial Court refused to determine jurisdiction of the State Court, pages 4-5-Execution of Mortgage a first lien in Kentucky, pages 6-7.

ORDER OF DISMISSAL IS VOID, pages 7-8, Could be no hearing at Louisville.

McClashan vs U. S. 71 Fed. 434—U. S. vs Kissel 63 Fed. 433.

Williams vs Gea Gully 29 Federal Cases 17, 736.

Hartford Ins. Co. vs Erie R. R. Co.—172 Fed. 899.

The Sarah Kennedy, 25 Fed. 569—Seattle Electric vs Hartless 144 Fed. 379.

Tacoma Railroad vs. Geiger 145 Fed. 76—Wan Lee vs. U. S. 44 Fed. 708.

Hall vs Devoe Manufacturing Co. 108 U. S. 415.

The Act of March 3, 1887 as amended—Kibler vs St. Louis R. R. Co. 147 Fed. 879.

Pitman vs U. S. 45 U. S. 159.

Butler vs U. S. 87 Fed. 625.

Rosencrans vs U. S. 165 U. S. 263.

Section 83 Judicial Code of the United States, defines district.

Recent Kenamer case, page 6-7-8-9 (Okla).

NO SERVICE STATE ORDER WHATSOEVER ON THE RES OR THE CORPORATION, see pages 16-17-18-19-20-24 of the Central Distributing Company.

Page 18 to 24—No Jurisdiction in Franklin County. (Indictment Statute).

L. & N. vs Commonwealth 112 Ky. 640.

Commonwealth vs Avery, 77 Kentucky 625.

Morrell vs Commonwealth 129 Kentucky 729.

Boyer Wheel Co. vs Commonwealth 129 Kentucky 742.

Helm vs James 129 Kentucky 289.

II

Commonwealth vs Long 30 SW 629..

Central Co. Brief for Service Writ and return, page 20.

PENALTY MUST BE ENFORCED IN COUNTY WHERE OFFENSE COMMITTED, Section 4281-4028-4029, Kentucky Statutes, an indictable offense.

Atterbury vs Waldeck 207 Kentucky 618.

Commonwealth vs Grand Central 97 Kentucky 325.

Harris vs Beaven 11 Bush 254.

Thompson vs Carr 13 B. M. 215, Kentucky Code 71-72-73, page 24 to 27.

ATTACHMENT MUST BE SERVED ON THE OFFICER TO WHOM DIRECTED AND THE PETITION MUST BE FILED AND SERVED BEFORE SERVICE OF ATTACHMENT ORDER.

Duncan vs Griswell 97 Ky., 546-11 B. M. Ky. 669.

Hearne vs Hander, 56 Ky. 479.

Section 1358 Carroll's Statutes.

Sectin 72 Carroll's Code of Kentucky.

Section 2524 Carroll's Statutes.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES WAS FROM ORDER DENYING INJUNCTION—NOT A FINAL ORDER, pages 8 to 10.

The Order of February 29th, 1940 denying Trial on the merits.
Internal Revenue-Martin, demitted as a party-defendant July 1, 1939.

USCA—Rule 25, sections 501 to 508, Ky. Code.

Motion for Judgment on April 11th, 1938 never passed on. Motion to Dismiss defense of Defendant Martin denied, and Motion for Pro-Confesso Judgment denied, 10 to 15.

Original Revenue ACT of 1934 provided the Auditor must bring suit for delinquent Taxes, and section 4169 Article 9 of the Statutes provides that the AUDITOR must collect defaulting obligations in Taxes, and section 112-5 to 112-8 provide the ATTORNEY GENERAL is the only party who can appear as Counsel in this kind of a case. Pages 10 to 13. Remedy in the Act.

Section 112-7 provides that the Attorney General shall keep the record;

Section 112-5 provides no outside counsel shall be employed—, Commonwealth vs Roberta Coal Co. 186 Ky. 402, construes the Statutes, and is supported by the following decisions:

C. & O. Railroad Co. vs Roskamp 179 Ky. 175.

McAlexander vs Wright 3 A. K. Marshall 189.

Belt vs Wilson 6 J. J. Marshall 495.

Commonwealth vs Louisville Property Co., 128 Ky. 780.

4 Cyc 928 and authorities there cited. Pages 15 to 20.

FRANKLIN CIRCUIT COURT HAD NO JURISDICTION UNDER SECTION 976, Carroll' Code.

Code of Kentucky, section 117.

Milwaukee County vs White Co., 296 US 268.

The Statute under which the Tax accrued was 1936 provides for imprisonment, and under the authorities cited, the Court had no jurisdiction to issue a Summons or Order of Attachment.

III

Helm vs James 129 Ky. 239.
Commonwealth vs Long 30 SW 629.
Barbour vs Newkirk 63 Ky. 631.
Life Ins. C. vs Edwards 247 Ky. 136.
Bankers Life, 254 Ky. 686.

NO ASSESSMENT WAS MADE ACCORDING TO LAW TO ADJUDICATE THE PENALTIES.

Section 679 Carroll's Code, City of Corbin vs Board of Education
26 Ky. 787.

Section 692, Kentucky Code, page 15 to 21.

THE MERITS OF THE ACTION MUST BE DETERMINED.

Case No. 18,076, Wright vs Deklyne.
Hunter vs Federal Life Ins. Co. 103 Fed. (2) 192.
Swift vs Inland Navigation Co. 234 Fed. 375.
Rule 29; Norfolk Turnpike Co. vs Virginia 225 US 264.
Collins vs Miller 252 US 364.
Stromberg Co. vs Arnson, 239 Fed. 891.
O'Keiffe vs New Orleans, 273, Fed. 560.
Rule 29, and section 266 USCA, pages 18 to 26.

DEFAULT IN PLEADING BARS FURTHER ACTION IN A PENDING CASE AND MAKES ANY JUDGMENT VOID RENDERED BY THE COURT, BY OPERATION OF LAW.

Dietch vs Southern Railroad Co. 53 Fed. (2) 97.
Asher vs Fordson Coal Co. 249 Ky. 117.
Fordson Coal Co. vs Jackson 7 Fed. (2) 119.

DEFAULT IN PLEADING FOR SIX MONTHS BARS ACTION.

Texas vs Wilder 92 Fed. (2) 993.
L. & N. Railroad vs Finn 235 US 601.
U. S. Supreme Court, rule 60, and decisions there cited. Pages
25 to 28.

COURT MUST MAKE FINDINGS, OR JUDGMENT IS VOID.

Lewellyn vs General Electric Co., 275 US 243.
Hardey vs Malley 288 US 415.
General Motors vs Swan 44 Fed. (2) 24.
Gerlach vs C. I. P. R. R. 65 Fe. (2) 867.
Hawthorne vs Bankers Life Co. 63 Fed. (2) 971.
Merriam vs Kusselman 45 Fed. (2) 983.
Title 28 USCA, Sec. 773.

Interstate Life vs Klaber 50 Fed. (2) 154.
American Surety Co. 58 Fed. (2) 234.

There can be no due process unless findings and conclusions are made when requested, and findings moved by party. Page 20 to 30.

DUE PROCESS AND EQUAL PROTECTION OF THE LAW DENIED ON THE RECORD.

Taylor on Due Process Sec. 138.
Scott vs McNeal 154 US 34.

III

Windsor vs McVeagh 93 US 274.
Royal Indemnity Co. vs Woodbury Granite Co. 101 Fed. 689.
Globe Steel Co. vs National Metal Co. 101 Fed. (2) 489.

THERE MUST BE A FINAL JUDGMENT OR THERE IS NO DUE PROCESS OR EQUAL PROTECTION, BECAUSE THE PARTIES TO THE ACTION COULD HAVE NO RIGHT OF APPEAL EXCEPT FROM A FINAL JUDGMENT. No Appeal from void Judgment.

Hohorst vs Picket Co. 148 US 262.
Oneida Navigation Corp. vs Job 252 US 521.
Arnold vs US 263 US 427.
Thompson vs Murphy (8th Circuit) 93 Fed. (2) 38.
Hobbs vs Westinghouse Co. vs Employers Liability Corp. 102F. (2) 32.
Baldwin vs Higgins 100 Fed. (2) 405.
Kilmer vs Griswold 67 Fed. 1017.
Hill vs Chicago R. R. Co. 140 US 52.
Ex-Parte Enameling Co. vs 201 US 156, pages 28 to 33.

UNLESS STATE LAWS ARE COMPLIED WITH THERE IS NO DUE PROCESS OR EQUAL PROTECTION OF THE LAW. Rules 27, C. C. A. reports, see the case of Shoemaker vs. Security Co., 159 Fed. 113.

Rev. Statutes Sec. 914, US Compiled 1901, page 684.

Erie Railroad Co. vs Tompkins 304 U. S.

Kentucky—Weber vs Weber 1, Metcalfe 18; Case vs Colston 1, Metcalfe 145.

Thomas vs Mahonney 9th Bush 111.

Manderson vs Speckert 79 Ky.

Kentucky Code 667, 509.

Taylor vs Breese 63 Fed. 678, pages 31, 32.

THE RIGHT TO FORECLOSE MORTGAGE IS A CONSTITUTIONAL RIGHT UNDER THE LAWS OF KENTUCKY AND IS A COMMON LAW ACTION TO BE TRIED TO A JURY UNDER ARTICLE 7 OF THE CONSTITUTION OF KENTUCKY, AND AMENDMENT 7 OF THE CONSTITUTION OF THE UNITED STATES; AND CANNOT BE WAIVED EXCEPT BY AN ENTRY ON THE RECORD.

Kentucky Code Sec. ———.

Marshall vs Holmes 141 US 589.

DeRees vs Costagua 254 US 170.

Wells Fargo Co. vs Taylor 254 US 175.

Rogers vs Hill 289 US 588.

Gulf Refining Co. vs US 269, US 125.

Sec. 57 Judicial Code, Title 28 provides for enforcement of Lien in Federal Court.

Orear Case 23 Ky. Reporter (1912).

Commonwealth vs Scott 80 Ky. 498.

COLLECTION OF IMPORT TAX VIOLATES SECTION 3 OF THE CONSTITUTION OF KENTUCKY, AND ARTICLE 1, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES.

J. Bacon & Sons vs Commonwealth 304 US 178.

May it please the Court:

**QUESTIONS TO BE DECIDED IN THIS CAUSE
INVOLVED IN EFFECT VALIDITY OF THE
ORDER OF APRIL 16, 1938.**

(Summary)

1. Can a Court so constituted (three Judges), hold a session out of the District where the cause of action is pending, and enter a valid Decree? It cannot by all decisions—cannot be waived.

2. Can a THREE JUDGE COURT enter a final decree in an interlocutory judgment, denying temporary injunction: Statute and decisions of this court prevent it?

3. Can a trial court refuse to make conclusions of law when moved to make them, where said motion is accompanied by special findings? No.

4. Can a THREE JUDGE COURT adjudicate the merits without hearing evidence on the merits. Title 28 section 773? No. Case 18076—Wright vs Deklyn, (Fed.) Void.

5. Can a trial court refuse to disallow appearance of counsel demitted by section 780, Rule 25, who have, as to the parties represented and with them, by operation of law been excluded from the cause? Sec-

tions 501 to 508, Kentucky Code; and any judgment rendered under Kentucky Code under such state of record is void.

6. Can the trial court permit appearance of parties to a proceeding who are by operation of law excluded, where they have not been substituted by revivorship? No; must proceed by service of summons and entry of final order of Court.

7. Where a motion for judgment, when defendant is in default, is made, affidavits permitted in support, can a court arbitrarily refuse to pass on the motion, and thereafter allow incompetent parties to appear and file motion to dismiss, and sustain said latter motion? No, the first motion must be disposed of.

8. Can a Motion for pro-confesso judgment be refused where the defaulting party has not plead for more than six months, without leave of court granted? Under Kentucky Code, no; and under Federal rules, 54, 55a and 60, no.

9. Can a summary judgment be refused, where there is more than six months default, and all pleaded facts are definite, except amount of damages? Not under Kentucky Code and Rule 56.

10. Where the statute of the state limits employment of counsel to emergency matters, outside of Attorney General, and fixes in a tax act who shall collect taxes under the act that are delinquent, can a suit be maintained by different party under different Act, which does not repeal former general law,